

Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOVANNA EDGE, an individual; LEAH HUMPHREY, an individual; LIBERTY ZISKA, an individual; AMELIA POWELL, an individual; NATALIE BJERKE, an individual; BRITTANY GIAZZI, an individual; JUANITA CASTANEDA GUERRERO, an individual; and MATTESON HERNANDEZ, an individual,

Plaintiffs,

v.

CITY OF EVERETT, a Washington Municipal Corporation,

Defendant.

No. 2:17-cv-01361-MJP

CITY OF EVERETT'S SURREPLY IN
OPPOSITION TO MOTION FOR
PRELIMINARY INJUNCTION

Pursuant to LCR 7(g), the City of Everett (the "City") respectfully requests that this Court strike or otherwise not consider inadmissible testimony contained in or attached to Plaintiffs' Reply to the City's Opposition to Plaintiffs' Motion for Preliminary Injunction (Dkt. No. 36) and the Declaration of Hannah S. Ard filed in support of Plaintiffs' Reply to the City's Opposition to Plaintiffs' Motion for Preliminary Injunction (Dkt. No. 37). Ms. Ard's declaration relies on inadmissible and unauthenticated information derived from websites. Ms. Ard's

CITY'S SURREPLY IN OPPOSITION TO MOTION
FOR PRELIMINARY INJUNCTION- 1

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1 declaration uses that data to form improper opinions without foundation or personal knowledge.
 2 Ms. Ard's declaration, and the portion of Plaintiffs' Reply that relies on it, should be stricken.

3 First, Ms. Ard's declaration and pages 4:18-5:1, 9:22-24, and 10:2-5 of Plaintiffs' Reply
 4 improperly rely on online information and data, which are hearsay. *See, e.g., Ponds v. Veterans*
 5 *Med. Research Found.*, No. 12-cv-1745 BEN(BGS), 2013 WL 607847, at *3 n.1 (S.D. Cal. Feb.
 6 15, 2013) ("Screen shots of internet web pages are not usually admissible to prove the truth of
 7 statements contained therein."); *Conroy v. Hewlett-Packard Co.*, No. 3:14-CV-01580-AC, 2016
 8 WL 1276552, at *5 (D. Or. Mar. 31, 2016) (written contents of website were inadmissible
 9 hearsay). The screen shots at issue are from a website that compiles crime data with an unstated
 10 methodology or scope. Ms. Ard's declaration contains no substantive information about the
 11 website, nor any indication of how the website's crime data was gathered or prepared (i.e., the
 12 original source of the data, whether the website gathers data from all crimes or merely a limited
 13 subset, whether the website includes incidents that did not result in a police report being written
 14 or charges being filed, and so on).

17 Second, Ms. Ard asserts no personal knowledge of the contents or accuracy of the
 18 material derived from the websites she utilized. Under Fed. R. Evid. 901(a), she cannot
 19 authenticate this data. *See, e.g., In re Homestore.com, Inc., Sec. Litig.*, 347 F. Supp. 2d 769, 782
 20 (C.D. Cal. 2004) (authentication of website printouts requires "some statement or affidavit from
 21 someone with knowledge"). The screen shots, Ms. Ard's statements and conclusions regarding
 22 the screen shots, and the corresponding portion of Plaintiffs' Reply brief, should be stricken on
 23 this additional ground. *See Lee v. Christian Coal. of Am., Inc.*, 160 F. Supp. 2d 14, 35 (D.D.C.
 24 2001) (disregarding unauthenticated documentation supplied in connection with a motion for
 25 preliminary injunction).

Finally, Ms. Ard's declaration and Plaintiffs' Reply at pages 4:18-5:1, 9:22-24, and 10:2-5 should be stricken for containing or relying on improper expert opinion testimony in violation of Fed. R. Evid. 702 and 703. As noted, Ms. Ard does not claim to have personal knowledge of the contents of her declaration or the underlying data. *See* Fed. R. Evid. 602, 701. She attempts to offer opinion evidence on local incidence of crime, yet fails to qualify herself as an expert in this field: "To be admissible, expert testimony must (1) address an issue beyond the common knowledge of the average layman, (2) be presented by a witness having sufficient expertise, and (3) assert a reasonable opinion given the state of the pertinent art or scientific knowledge." *United States v. Vallejo*, 237 F.3d 1008, 1019 (9th Cir. 2001). Ms. Ard nonetheless opines that the "incidence of crime in areas around the [bikini barista] stands is no higher than the incidence in other similar commercial areas." Dkt. No. 37 at 3 (¶ 15; *see also* ¶ 21). The basis for the theory or techniques Ms. Ard used to reach her conclusion is unclear (for example, the reasons for selecting certain geographic and temporal parameters to reach the opinions stated, similar limitations inherent in the data relied upon, and whether the information is statistically significant to support the conclusions). Such unsupported opinions do not meet the standard for reliability under Fed. R. Evid. 702 and should not be considered for this additional reason.¹

DATED this 8th day of November, 2017.

CITY OF EVERETT

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¹ Nor can Plaintiffs rely on Fed. R. Evid. 703 with respect to the underlying data. Rule 703 provides that underlying facts and data need not be admissible if they are "of a type reasonably relied on by experts in the field in forming opinions or inferences upon the subject." Ms. Ard does not qualify as an expert for purposes of this rule.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2017, I electronically filed the foregoing document with the Clerk of the United States District Court using the CM/ECF system which will send notification of such filing to all parties who are registered with the CM/ECF system.

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DATED this 8th day of November, 2017.


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